Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 94-136

In re Application of

ELLIS THOMPSON CORPORATION — File No. 14261-CL-P-134-A-86

For Facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block A in Market No. 134
Atlantic City, New Jersey

MEMORANDUM OPINION AND ORDER

Adopted: June 28, 1995; **Released: July 7, 1995**

By the Review Board: MARINO (Chairman) and GREENE.

1. On March 27, 1995, Ameritel filed an Appeal pursuant to 47 CFR § 1.301(a)(1) from the denial by Administrative Law Judge Joseph Chachkin (ALJ) of its petition to intervene in this proceeding as a party-in-interest. *Memorandum Opinion and Order*, FCC 95M-68, released March 7, 1995 (*MO&O*). Ameritel claims that the ALJ's ruling is in direct conflict with *Algreg Cellular Engineering*, 6 FCC Rcd 5299, 5300 (Rev. Bd. 1991) (subsequent history omitted), which held that both Congress and the Commission have stated that a mutually exclusive applicant has a right to intervene as a party-in-interest on the question of whether a lottery winner is fully qualified. Appeal at 3-4. Oppositions were filed on April 6, 1995, respectively, by Ellis Thompson Corporation, American Cellular Network Corp, and Telephone and Data Systems, Inc. We affirm the ALJ's denial of intervention because Ameritel's original petition to intervene did not establish, as required by 47 USC § 309(d) and (e) of the Communications Act of 1934, as amended, and 47 CFR § 1.223(a) of the Commission's Rules, that Ameritel is a mutually exclusive applicant and therefore entitled to intervene as a "party-in-interest." We also agree with the ALJ that Ameritel failed to establish that its participation would assist the Commission in resolving the designated issue and that it should, therefore, be permitted to intervene as a matter of discretion.

2. *Background:* To expedite the licensing of cellular radio facilities, the Commission streamlined its comparative proceedings so that the initial selection from a pool of competing applications is made by lottery rather than the traditional comparative hearing. *See Algreg Cellular Engineering*, 9 FCC Rcd 5098, at 5108 ¶ 8 (Rev. Bd. 1994) (subsequent history omitted). After selection of a winner, competing applicants can challenge the winning applicant's basic qualifications; and, when necessary, a trial-type hearing will be designated pursuant to 47 USC 309(e). *See Algreg Cellular, supra*, 6 FCC Rcd at 5300 ¶ 8. Here, the application of Ellis Thompson was the winning lottery application for Atlantic City, New Jersey. Following a court remand, however, the Commission designated Ellis Thompson's application for hearing to determine whether "a third party became a real party in interest in the Thompson application contrary to the Commission's rule." *Hearing Designation Order*, 60 Fed. Reg. 1776, published on January 5, 1995; 9 FCC Rcd 7138 (1994) (*HDO*). Ameritel was not named a party to the hearing.

3. On February 6, 1995, Ameritel filed its petition to intervene asserting that Ameritel is an Ohio general partnership and the successor-in-interest to Ameritel, Inc., a mutually exclusive applicant for the Atlantic City, New Jersey cellular authorization, and that, pursuant to unambiguous Commission precedent, including *Algreg Cellular, supra*, it was entitled to intervene as a party-in-interest as a matter of right. To support the claim of being the successor-in-interest to Ameritel, Inc., Ameritel attached to its petition the following declaration under penalty of perjury by Richard Rowley:

> 1. I am a general partner in Ameritel ("Ameritel"), successor-in-interest to Ameritel, Inc.
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> 2. I have reviewed the foregoing "Petition To Intervene" ("Petition") to be filed on behalf of Ameritel with the Federal Communications Commission ("Commission") with respect to the hearing designated by the Commission in CC Docket No. 94-136 in connection with the application of Ellis Thompson Corporation for nonwireline cellular facilities to operate on frequency block A in Atlantic City, New Jersey (File No. 14261-CL-P-134-A-86).
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> 3. Except for those facts of which official notice may be taken by the Commission, all facts set forth in the foregoing Petition are true and correct of my own personal knowledge and belief.

Comments and oppositions were filed by other parties to the hearing, including the Wireless Telecommunications Bureau.

4. On March 7, 1995, the ALJ denied the petition to intervene as of right, stating:

> [1] Ameritel has failed to establish that it is the successor-in-interest to Ameritel, Inc., the 1986 applicant for the nonwireline authorization. Ameritel's claim rests solely on the bare declaration of Richard Rowley, a general partner in Ameritel. Ameritel offers no supporting evidence for Rowley's assertion.
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> [2] In any event, the available facts do not support a finding that Ameritel is the successor-in-interest of Ameritel, Inc. As related by the parties, based on state records, Ameritel, Inc., the applicant, ceased to exist as a separate entity when it was merged into another entity, Metrotec, Inc. on June 15, 1988. Further, while a new entity called Ameritel, Inc., was incorporated in Ohio in 1993, there is no record of a general partnership under the name of Ameritel doing business in Ohio. Under Ohio law, all persons or entities transacting business in the state must, at very least, file a fictitious name report with the Secretary of State (see Amcell Opposition, Exhibit 1).

MO&O at ¶ 3.

5. In its appeal, Ameritel urges that it "clearly stated its status and its right to intervene" in its original petition and that this showing was "unequivocally supported by a Declaration under penalty of perjury by Richard Rowley, a person with personal knowledge of these facts," and further argues that the ALJ's erroneous ruling was caused when the parties opposing intervention "mounted a campaign of disinformation based on incomplete, inaccurate and misleading allegations." Appeal at 3-4. Ameritel claims that, at minimum, it should have been afforded the opportunity to reply to the oppositions before the ALJ denied its petition. *Id.* at 4-5. Ameritel charges that by denying it intervention, the ALJ acted arbitrarily, contrary to established precedent, and in violation of its due process rights. *Id.* at 5.

6. *Discussion:* Ameritel's argument ignores a fatal legal flaw in its original petition to intervene: its petition did not contain specific allegations of fact sufficient to show that Ameritel was the successor-in-interest to Ameritel, Inc., a mutually exclusive applicant, and, therefore, a party-in-interest. Section 309(d)(1) of the Communications Act specifically provides:

> The petition shall contain specific allegations of fact sufficient to show that petitioner is a party in interest.... Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof.

Section 1.223(a) of the Commission Rules requires a party-in-interest to file "under oath and not more than 30 days after publication in the Federal Register of the hearing issues.... a petition for intervention showing the basis of its interest." The ALJ correctly held that Ameritel's allegation of party status that it was the successor-in-interest to Ameritel, Inc. rested "solely on the bare declaration of Richard Rowley" and offered "no supporting evidence for Rowley's assertion." Rowley did not offer any explanation about how, when, and by whom Ameritel, Inc., a corporation, had been changed to a partnership. Nor did Ameritel's petition incorporate, or ask the ALJ to take official notice of, any documents which supported the legal conclusion that it was the successor-in-interest to Ameritel, Inc. *Algreg Cellular,* 6 FCC Rcd at 5300, on which Ameritel mainly relied, is to no avail because, unlike in *Algreg,* where the party requesting intervention established in its petition that it was a mutually exclusive applicant, Ameritel did not do so here.

7. Some sixty days after publication of the *Hearing Designation Order,* para. 2 above, and subsequent to the ALJ's ruling, Ameritel on March 21, 1995, filed a response to the oppositions, attaching a new four page affidavit and three pages of documents to support its claim that it was the successor-in-interest to Ameritel, Inc. Appeal, Attach Ex. 5 at exh. 1 pp. 1-4. By *Order,* FCC 95M-84, released March 24, 1995, at n.1, the ALJ stated that "Ameritel provides no explanation for its inexcusably tardy pleading, which will be dismissed." Ameritel now argues that the ALJ should have awaited or sought its reply to the oppositions before denying intervention. Appeal p. 4-5. No authority is cited to support this argument and Ameritel itself recognizes that Section 1.294 of the Rules does not permit a response to an opposition to petition to intervene. We note that Section 309(d)(1) of the Act, 47 USC § 309(d)(1), contemplates the filing of only a petition to intervene to which the applicant "shall be given an opportunity to reply." Thus, Ameritel's response was not only unauthorized by these legal requirements; it was also filed long after the 30-day time period, a date certain for justifying intervention established by 47 USC § 309(e), and 47 CFR § 1.223(a). *See also Algreg Cellular, supra,* 6 FCC Rcd at 5300 ¶ 6 referring to 1964 amendment to § 309 establishing a thirty-day "date certain" for intervention. Given these specific statutory and Commission requirements, we do not believe that it is appropriate for the Board to consider the substance of Ameritel's untimely and unauthorized response or the parties' oppositions thereto. We note that the pleading merely attempts to establish Ameritel's status as the successor-in-interest but does not raise any public interest questions about Ellis Thompson that would warrant Commission attention. The ALJ did not err in denying intervention as of right.

8. In the last footnote of its Appeal (at 5, n.9), Ameritel claims that it was also incorrectly denied discretionary intervention by the ALJ. Section 1.223(b) of the Commission's rules, 47 CFR § 1.223(b), which confers the ALJ with discretion to allow intervention, requires, among other things, that a petitioner must show how its "participation will assist the Commission in the determination of the issues in question." Applying the Commission's requirements, the ALJ reasoned that:

> Other than to offer the Commission its assistance in 'fully exploring the relationship between' the parties to this proceeding, Ameritel does not demonstrate that it will make any specific contribution to the resolution of the designated issue. Nowhere does Ameritel allege, much less show, that if it is not allowed to intervene, important issues of fact or law will not be adequately raised or argued. Ameritel appears to believe its presence is required to ensure that the examination of Ellis Thompson's qualifications as a licensee in the hearing is sufficiently thorough. Ameritel ignores the fact that the Wireless Bureau is a party. Ameritel offers no evidence that the Wireless Bureau will be less than vigorous in its prosecution of this case. The Presiding Judge is fully confident that the Bureau's participation and that of the other named parties assures that the designated issue will be fully explored.

MO&O at ¶ 6. We agree with the ALJ that Ameritel did not demonstrate that "it will make any specific contribution to the resolution of the designated issue." We therefore affirm his ruling. *See Telephone Data Systems, Inc.,* 9 FCC Rcd 2780, 2781 (Rev. Bd. 1994) (denial of discretionary intervention where petitioner had failed to show that "its participation will assist the Commission in the resolution of the issues as hand").

9. ACCORDINGLY, IT IS ORDERED, That Ameritel's Appeal filed on March 27, 1995, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board